IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

SUSAN E. RYAN, AS ADMINISTRATOR
OF THE ESTATE OF BRIAN MCDONALD,
Plaintiff/Appellee,

v.

MARK NAPIER, PIMA COUNTY SHERIFF;
AND JOSEPH KLEIN,
Defendants/Appellants.

No. 2 CA-CV 2016-0155
Filed October 18, 2017

Appeal from the Superior Court in Pima County
No. C20142895
The Honorable Catherine M. Woods, Judge

AFFIRMED

COUNSEL

Dwyer Hernandez, P.C., Tucson
By Amy Hernandez
Counsel for Plaintiff/Appellee

Barbara LaWall, Pima County Attorney
By Nancy J. Davis, Deputy County Attorney, Tucson
Counsel for Defendants/Appellants

OPINION

Chief Judge Eckerstrom authored the opinion of the Court, in which Judge Conlogue[1] concurred.

E C K E R S T R O M, Chief Judge:

¶1 Pima County Sheriff Mark Napier and Deputy Joseph Klein appeal a jury verdict against them for injuries plaintiff Brian McDonald sustained when he was bitten by a sheriff's department K-9 police dog. Appellants argue the trial court erred by (1) allowing the case to proceed as a negligence action as opposed to a battery action, (2) placing the burden of proving justification on them rather than on McDonald, (3) allowing lay and expert witness testimony about United States Supreme Court use-of-force case law, and (4) rejecting their position that A.R.S. § 11-1025(B) prohibits an action for damages for injuries inflicted by a K-9 under the circumstances. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury verdict. *Zuluaga ex rel. Zuluaga v. Bashas', Inc.*, 242 Ariz. 205, ¶ 2, 394 P.3d 32, 34 (App. 2017). On November 14, 2013, around 11:30 P.M., Pima County Sheriff's Deputy Matthew Dixon was driving south on a road in the Tucson foothills when McDonald, driving north in the wrong lane, nearly hit him head-on. Dixon called the incident in on his radio, activated his emergency lights, and made a U-turn, intending to stop the car for driving the wrong way and nearly causing a collision.

[1]The Hon. James L. Conlogue, a judge of the Cochise County Superior Court, is authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court order filed June 26, 2017.

¶3 After a brief pursuit at speeds of about thirty-five miles per hour, the car stopped. Dixon got out and began yelling commands to McDonald. Although Dixon could see McDonald's driver-side front window was down, McDonald did not respond to or comply with the commands.

¶4 An aerial video of the incident, taken from a law enforcement airplane using heat imaging technology and later admitted into evidence, begins around this point. A few minutes into the stop, Deputy Klein, a K-9 handler, arrived with his dog and took over the job of issuing commands to McDonald, including something to the effect of "canine, talk to me now or I will send my dog." At one point, McDonald looked over toward where Klein and the K-9 were standing. Then McDonald rolled up his window and drove away, continuing along the same road.

¶5 Another deputy, who was farther north along the road, deployed road spikes. McDonald ran over the spikes, which punctured three of his tires. Nevertheless, the pursuit continued at speeds of thirty-five to forty miles per hour. Over the radio, Klein said, "If the vehicle stops, dog will be deployed if he goes mobile."

¶6 McDonald came to a stop just south of a major intersection. His car hopped the curb as it stopped. To the right of his car there was a small desert area and a residential area beyond that. About seven marked squad cars, with their emergency lights activated, fanned out behind and to the left of his car, and about nine uniformed deputies were on-scene. The deputies considered this a high-risk stop, so they did not approach the car. Klein got out with his K-9 but remained behind his squad car, yelling more commands from there. Other deputies had their guns drawn.

¶7 Shortly after he stopped, McDonald got out. Klein warned McDonald to "stop or you will be bitten." The video recording admitted at trial shows McDonald walking slowly toward the rear of his car, reaching out and putting his hand on the trunk of the car as if to steady himself. He continued walking around the trunk of his car and then back up along the passenger side, stopping about halfway up the passenger side. As he slowly brought his hands up to rest them on top of the car, Klein released the K-9, which ran

over and bit McDonald's leg and dragged him around on the ground. The K-9 held the bite for thirty-eight seconds, causing serious injuries and permanent disfigurement.

¶8 Subsequent investigation revealed that McDonald has Type 1 diabetes and at the time of the incident his blood sugar level had been dangerously low. When the deputies arrested him, they found glucose tabs in his sock. They also discovered he had a gun in an ankle holster. None of the deputies had been aware that McDonald was armed before Klein released the K-9. There were no bulges in his clothing to suggest that he might have had a gun, nor did McDonald reach for the gun at any point during the incident.

¶9 McDonald sued the Pima County Sheriff[2] and Klein, alleging negligence. The trial court denied defendants' motion for summary judgment, holding that A.R.S. § 11-1025 did not bar the action, and that McDonald could proceed under a negligence theory even though Klein had intentionally released the K-9. The court also denied defendants' motion in limine to preclude testimony about *Graham v. Connor*, 490 U.S. 386 (1989).

¶10 The case proceeded to a jury trial.[3] The court rejected defendants' request for an instruction allocating the burden of proving lack of justification to McDonald, and instead instructed the jury that defendants had the burden of proving justification. The jury returned a verdict of $650,000, attributing ninety-five percent of the fault to defendants and five percent to McDonald. After the court

---

[2]McDonald originally sued then-sheriff Clarence Dupnik. This court granted appellants' unopposed motion to substitute Napier, the newly elected sheriff, as a party pursuant to Rule 27(c)(2), Ariz. R. Civ. App. P.

[3]Appellants did not designate a transcript of the second day of the jury trial, which includes McDonald's testimony, as part of the record on appeal. *See generally* Ariz. R. Civ. App. P. 11(b). We presume the missing transcript would support the jury's verdict. *See Varco, Inc. v. UNS Elec., Inc.*, 242 Ariz. 166, ¶ 3, 393 P.3d 946, 949 (App. 2017).

denied defendants' motions for new trial or for judgment as a matter of law, they timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A)(1).

Negligence or Battery

¶11 Appellants first argue that because there was no dispute that Klein intentionally released the K-9 in order to apprehend McDonald, the trial court erred by denying their motion for summary judgment as to negligence.[4] They maintain there is no cause of action against a law enforcement officer in Arizona for negligent use of force, and McDonald should have been required to bring this case under an intentional tort such as battery rather than as a negligence action.

¶12 Under Arizona law, a battery occurs where a person "intentionally engages in an act that results in a harmful or offensive contact with the person of another." *Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, ¶ 9, 70 P.3d 435, 438 (2003), *citing* Restatement (Second) of Torts §§ 13, 18 (1965); *see also Chappell v. Wenholz*, 226 Ariz. 309, ¶ 10, 247 P.3d 192, 195 (App. 2011) ("[B]attery is an intentional tort under Arizona law."). In contrast, negligence occurs where the defendant has breached a duty to conform to a certain standard of care and the defendant's conduct is causally connected to the plaintiff's actual damages. *See Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007).

¶13 We begin with the proposition that, in bringing suit, it is the plaintiff's prerogative to identify particular harms a defendant has caused and the plaintiff is free to connect those harms to particular theories of liability as he or she sees fit. Quite often, that decision will have significant substantive ramifications. *See, e.g.*, *Shetter v. Rochelle*, 2 Ariz. App. 358, 366-67, 409 P.2d 74, 82-83 (1965) (although label placed on cause of action has no "great significance," "theories of liability still have substance" and whether theory of liability against

[4]Generally, denial of summary judgment is not an appealable order, but we may review such a denial if, as here, it was based on a point of law. *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 4, 122 P.3d 6, 9 (App. 2005).

surgeon who failed to explain risk to patient adequately was battery or negligence would affect extent of damages for which surgeon could be liable). It is also well established that a single incident or course of conduct may give rise to multiple possible theories of liability. *See, e.g.*, *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, ¶¶ 59-61, 38 P.3d 12, 28-29 (2002) (breach of implied covenant of good faith and fair dealing can lead to liability in either contract or tort depending on circumstances).

¶14 Appellants cite no Arizona authority barring McDonald from styling this case as a negligence action rather than a battery action, and we are aware of none. Arizona case law on the issue is admittedly limited, but in two similar cases, negligence-based claims have at least been raised. In *Mulhern v. City of Scottsdale*, plaintiffs pursued a wrongful-death claim against the city based on the alleged negligence of an on-duty police officer who had intentionally shot and killed their family member. 165 Ariz. 395, 396-97, 799 P.2d 15, 16-17 (App. 1990). Their theory was that the officer had "acted negligently in using deadly force." *Id.* at 398, 799 P.2d at 18. This wrongful-death claim was allowed to proceed all the way to a jury verdict. *Id.* at 396, 799 P.2d at 16. *Weekly v. City of Mesa*, 181 Ariz. 159, 888 P.2d 1346 (App. 1994), is also somewhat instructive. In that case, Weekly refused to submit to an arrest, and then a K-9 officer "directed the dog to attack" him. *Id.* at 162, 888 P.2d at 1349. Weekly sued the city and alleged, among other claims, "negligent use of excessive force." *Id.* at 161-62 & n.2, 888 P.2d at 1348-49 & n.2. Although no issues related to that claim were before this court on appeal, neither did our opinion suggest there was any legal barrier to a cause of action grounded in negligence principles, even though the officer intended to release the K-9 for the purpose of attacking Weekly. *See id*.

¶15 While we acknowledge their limitations, *Mulhern*, and to a lesser extent, *Weekly*, are nevertheless consistent with the proposition that a plaintiff may bring an action sounding in negligence against an appropriate public entity where a law enforcement officer's process of evaluating whether to use force or how much force to use fell below the standard of care of a reasonable

officer under the circumstances and the subsequent decision to use force resulted in damages. Today we so hold.[5]

¶16 In support of our holding, we find persuasive a case from the District of Columbia. In *Reed v. District of Columbia*, 474 F. Supp. 2d 163, 165, 174 (D.C. 2007), the District maintained its officer had shot the decedent in self-defense reasonably believing she had a gun. Plaintiffs' witnesses testified the officer had shot her while her hands were empty and held up in the air. *Id.* at 165-66, 174. The District argued summary judgment was appropriate as to the plaintiffs' negligence claims because those claims were "indistinguishable from their claims for assault and battery." *Id.* at 173. The court disagreed, determining the claims were separate and distinct. *Id.* at 173-74. It held that summary judgment for the defendants on negligence was inappropriate because a "distinct act of negligence, a misperception of fact, may have played a part in the [officer's] decision to fire." *Id.* at 174, *quoting District of Columbia v. Chinn*, 839 A.2d 701, 711 (D.C. 2003). Under the *Reed* plaintiffs' theory and version of events, "a negligent act . . . precede[d] the application of the relevant force of resort to firearms, i.e., prior to the pulling of the trigger." *Id.*, *quoting Chinn*, 839 A.2d at 711; *accord Brown v. Ransweiler*, 89 Cal. Rptr. 3d 801, 817 (Ct. App. 2009) (officers have duty to use reasonable care in deciding to use deadly force, and lack of due care can give rise to negligence liability for intentional shooting by officer).

¶17 Here, as in *Reed*, McDonald's negligence claim is distinct from a hypothetical battery claim he could have chosen to bring. His negligence claim focuses on whether a reasonable officer in Klein's

---

[5] Inasmuch as it informs our decision of whether to issue a published opinion in this case, *see* Ariz. R. Sup. Ct. 111(c)(1)(B), (d), we note that the federal district court in Arizona, in rejecting law enforcement defendants' motion for partial summary judgment as to an Arizona negligence claim, has held that "[t]he public has an interest in ensuring that police officers do not use more force than is justified against their citizens, even if excessive force is applied as the result of a mistake in judgment," *Dominguez v. Shaw*, No. CV 10-01173-PHX-FJM, 2011 WL 6297971, at *2-*3 (D. Ariz. Dec. 16, 2011).

position would have concluded that releasing a K-9 was reasonable and appropriate under the totality of the circumstances leading up to that decision. *See Austin v. City of Scottsdale*, 140 Ariz. 579, 581-82, 684 P.2d 151, 153-54 (1984) (whether dispatcher who did not assign emergency call as department procedures mandated and whether department's failure to warn decedent's family of reported threat constituted negligence were jury questions—"the City of Scottsdale, having opted to provide police protection, had a duty to act as would a reasonably careful and prudent police department in the same circumstances"). This is a separate issue from whether Klein's subsequent intentional act of releasing the K-9 resulted in a harmful or offensive contact with McDonald's person—the central question of a battery claim McDonald chose not to bring. *See Chinn*, 839 A.2d at 707 (negligence theory of liability appropriate if there is "an independent breach of a standard of care beyond that of not using excessive force in making an arrest, which may properly be analyzed and considered by the jury on its own terms apart from the intentional tort of battery and the defense of privilege").

¶18 As in *Reed*, there are two competing versions of events here. Appellants argued Klein reasonably believed releasing the K-9 was necessary for officer safety, while McDonald maintained this belief was not reasonable under the totality of the circumstances leading up to Klein's decision to "pull the trigger" on the K-9. *Cf. Chinn*, 839 A.2d at 711 (negligence theory appropriate where, in at least one of multiple "alternate scenarios," "a distinct act of negligence, a misperception of fact, may have played a part in the decision to fire").

¶19 Appellants cite Restatement (Second) of Torts § 282 cmt. d (1965), which excludes from the definition of negligence "conduct which creates liability because of the actor's intention to invade a legally protected interest" of another. But here, McDonald alleged that Klein's *evaluation of whether* to intentionally release the K-9 was negligent, not that he intended to invade McDonald's legally protected interest by releasing the canine. Another case appellants rely on, *City of Miami v. Sanders*, 672 So. 2d 46, 48 (Fla. Dist. Ct. App. 1996), acknowledges this distinction as well. Although that case holds there is no cause of action for "'negligent' use of excessive

force" because use of excessive force is necessarily intentional,[6] it recognizes "that a separate negligence claim based upon a distinct act of negligence may be brought against a police officer in conjunction with a claim for excessive use of force." *Id.*, *citing Mazzilli v. Doud*, 485 So. 2d 477 (Fla. Dist. Ct. App. 1986).[7] The trial court correctly rejected appellants' position that the existence of a separate potential battery claim should have legally precluded McDonald from bringing a negligence action based on earlier conduct.

Burden of Proof of Justification Under A.R.S. §§ 13-409 and 13-413

¶20 Appellants argue the trial court erred by declining their requested justification instruction. The proposed instruction would have stated it was McDonald's burden to prove Klein's use of the K-9 was not justified. The court instead instructed the jury that it was Klein's burden to prove the release of the K-9 was justified. As questions of law, we review de novo the appropriate burden of proof, *Am. Pepper Supply Co. v. Fed. Ins. Co.*, 208 Ariz. 307, ¶ 8, 93 P.3d 507, 509 (2004), and whether jury instructions accurately state the law, *State v. Fierro*, 220 Ariz. 337, ¶ 4, 206 P.3d 786, 787 (App. 2008). We also review de novo whether justification may be raised as a defense to a charge or claim. *See State v. Almaguer*, 232 Ariz. 190, ¶ 6, 303 P.3d 84, 87 (App. 2013).

---

[6] We need not and do not decide whether Arizona law recognizes a separate tort of "negligent use of excessive force," nor should this opinion be read as creating a "new tort," as appellants suggested at oral argument. McDonald alleged only common-law negligence, and that is the only cause of action at issue in the present matter.

[7] Appellants also cite *Jenkins v. N.C. Dep't of Motor Vehicles*, 94 S.E.2d 577, 580 (N.C. 1956), for the proposition that an intentional act is not a negligent act. That case does not distinguish between the intentional use of force and the earlier negligent evaluation of the necessity of the use of intentional force, however, and is therefore unhelpful in resolving the issue before us.

¶21 Section 13-413, A.R.S., provides: "No person in this state shall be subject to civil liability for engaging in conduct otherwise justified pursuant to the provisions of this chapter." One provision in the same chapter applies to certain uses of force in effecting an arrest. It says:

> A person is justified in threatening or using physical force against another if in making or assisting in making an arrest or detention or in preventing or assisting in preventing the escape after arrest or detention of that other person, such person uses or threatens to use physical force and all of the following exist:
>
> 1. A reasonable person would believe that such force is immediately necessary to effect the arrest or detention or prevent the escape.
>
> 2. Such person makes known the purpose of the arrest or detention or believes that it is otherwise known or cannot reasonably be made known to the person to be arrested or detained.
>
> 3. A reasonable person would believe the arrest or detention to be lawful.

A.R.S. § 13-409.

¶22 Appellants assert the question of which party bears the burden of proving justification in a civil use-of-force case against law enforcement is an issue of first impression in Arizona. Citing *Edson v. City of Anaheim*, 74 Cal. Rptr. 2d 614, 615-16 (Ct. App. 1998), they argue this court should hold the burden rests on the plaintiff to disprove justification. McDonald argues in his answering brief that this is not an issue of first impression and contends *Weekly*, 181 Ariz. at 165-66 & n.5, 888 P.2d at 1352-53 & n.5, and *Pfeil v. Smith*, 183 Ariz.

63, 65-66, 900 P.2d 12, 14-15 (App. 1995), are controlling, placing the burden on the defendant.

¶23 We need not address the appropriate burden of proof of justification in a battery case involving a law enforcement defendant, because we conclude that in this negligence case, justification was not an appropriate defense. Appellants recognize in their reply brief that where a plaintiff has alleged negligence, as opposed to an intentional tort such as battery, a justification defense is incongruous. As explained above, McDonald's negligence theory focused on the deputy's negligent misperception of fact leading up to Klein's release of the dog, *see Gipson*, 214 Ariz. 141, ¶ 9, 150 P.3d at 230, whereas a hypothetical battery action arising out of these facts would have focused on Klein's intentional release of the dog and its subsequent harmful contact with McDonald's leg, *see Duncan*, 205 Ariz. 306, ¶ 9, 70 P.3d at 438. It is the latter to which § 13-409 arguably would have applied.

¶24 We find *Korzep v. Superior Court* instructive. 172 Ariz. 534, 838 P.2d 1295 (App. 1991). There, we addressed whether a defendant is entitled to present a justification defense when charged only with negligent or reckless conduct. *Id.*, 172 Ariz. at 535-36, 838 P.2d at 1296-97. We held justification is unavailable as a defense to "a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability." *Id.*, 172 Ariz. at 539, 838 P.2d at 1300, *quoting* Model Penal Code § 3.09(2). Just as justification is unavailable as a defense to a crime with a mens rea of negligence where a defendant was negligent in ascertaining the facts before using force, *id.*, so too justification is unavailable as a defense to the tort of negligence where a defendant was negligent in ascertaining the facts before using force.

¶25 Furthermore, by its terms, the conduct that may be justified under § 13-409 is one's "threat[] or us[e]" of physical force against another—not a negligent misperception of fact contributing to one's decision to threaten or use force. And § 13-413 proscribes civil liability only for the "conduct otherwise justified pursuant to the provisions of" the justification chapter, i.e., the "threat[] or us[e]" of physical force under § 13-409. Because McDonald sought recovery for the deputy's negligent conduct before Klein released the K-9, *cf.*

Reed, 474 F. Supp. 2d at 174, an argument that Klein's use of force was justified is inapposite to the cause of action.[8] The issue presented by McDonald's cause of action was whether McDonald could meet his burden of showing Klein had breached his duty of reasonable care with respect to his assessment of the situation. If Klein acted as a reasonable officer under the circumstances, then McDonald failed to prove negligence. A justification defense would be superfluous in those circumstances, and a justification instruction would only serve to confuse the jury.

¶26 The trial court erred by allowing appellants to assert an affirmative defense of justification as to the negligence claim in this case. However, regardless of who bore the burden of demonstrating justification under the resulting instruction, the error inured to appellants' benefit because it allowed the jury to consider an additional basis for a possible defense verdict. Thus, the error does not require reversal. *See* Ariz. R. Civ. P. 61 (court must disregard error not affecting party's substantial rights).

Testimony About *Graham v. Connor*

¶27 Appellants contend the trial court abused its discretion by denying their motion in limine to preclude all testimony about the United States Supreme Court case of *Graham v. Connor*, 490 U.S. 386 (1989). *See Felipe v. Theme Tech Corp.*, 235 Ariz. 520, ¶ 26, 334 P.3d 210, 217 (App. 2014) (evidentiary rulings reviewed for abuse of discretion). *Graham* addresses an action under 42 U.S.C. § 1983 setting forth a three-part test for reasonableness in the context of a Fourth Amendment excessive-force claim. 490 U.S. at 388, 396. *Graham* holds analysis of the reasonableness of the force used to effect a Fourth Amendment seizure is fact specific and requires attention to (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and

[8]To the extent that *Garcia v. United States*, 826 F.2d 806, 809-10 (9th Cir. 1987), could be read to suggest a different result, we conclude it does not state Arizona law correctly in this respect and decline to follow it. *See Dube v. Likins*, 216 Ariz. 406, ¶ 37, 167 P.3d 93, 104 (App. 2007) (federal decisions on state law issues not binding on this court).

(3) "whether he is actively resisting arrest or attempting to evade arrest by flight." *Id. Graham* also stands for the proposition that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

¶28 Before trial, appellants moved in limine to preclude any mention of *Graham* or "any other Fourth Amendment case law," reasoning that case law is not evidence, and in any event, this was a state law negligence action rather than a § 1983 action. After a hearing, the trial court denied the motion in relevant part,[9] ruling that Klein, Klein's supervisors, and both sides' expert witnesses would be permitted to testify about *Graham* "to the extent it helps to set an expectation of what is required or not allowed in the use of force."

¶29 On day three of trial, McDonald's expert witness testified about *Graham* and its three-factor test, explaining it was one consideration underlying his opinion that Klein's use of force was not reasonable. On day four, appellants' expert witness opined that Klein's use of the K-9 was appropriate based on the *Graham* factors. On day five, Klein testified *Graham* was given "[a] lot of weight" in his own K-9 training. And on day six, Klein's supervisor testified his K-9 officers are trained on *Graham* because "[t]he elements of that case are a good guideline to use before they deploy their dog." He also explained he had conducted an internal sheriff's department use-of-force review following the incident and had concluded, based in part on the *Graham* factors, that Klein's decision to release the K-9 had been "appropriate and reasonable" and had been "the safest option for the deputies."[10]

---

[9] The trial court granted the motion in limine in part as to testimony about *Graham* by other deputies in the sheriff's department. That aspect of the ruling is not before us.

[10] The minute entry from day two of trial reflects that the court and counsel also discussed *Graham* that day. We presume that the missing transcript of that discussion would provide further support for the court's ruling. *See Varco*, 242 Ariz. 166, ¶ 3, 393 P.3d at 949.

¶30 Appellants first suggest, as they did below, that the *Graham* testimony was inadmissible under Rule 403, Ariz. R. Evid. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. Ariz. R. Evid. 401. Although relevant evidence is generally admissible, *see* Ariz. R. Evid. 402, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury," among other dangers, Ariz. R. Evid. 403.

¶31 The trial court correctly determined the *Graham* standard was relevant to help the jury understand the basis for the conclusions of the two experts and of Klein's supervisor as to the reasonableness of Klein's actions. The court also correctly held *Graham* was relevant to the extent that it "help[ed] to set an expectation of what is required or not allowed in the use of force," such as through K-9 officer training. Indeed, Klein's supervisor testified K-9 officers are trained on *Graham* because "[t]he elements of that case are a good guideline to use before they deploy their dog."

¶32 The trial court also did not abuse its discretion in determining that the probative value of the *Graham* testimony was not substantially outweighed by the risk of confusing the issues or misleading the jury just because this case sounded in negligence rather than in Fourth Amendment principles. *See Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, ¶ 53, 92 P.3d 882, 896 (App. 2004) (Rule 403 balancing is province of trial court, not appellate courts). Contrary to appellants' suggestion, they were not "required to prove that [Klein's] use of the police dog complied with *Graham*." The jury instructions negated any danger of such confusion. The court instructed the jury on the elements of negligence, not on the *Graham* factors or other legal standards for cases brought under § 1983. We presume the jury followed those instructions in deciding the case. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006). The court did not abuse its discretion under Rule 403.[11]

[11]Appellants also appear to argue the *Graham* testimony was prejudicial because witnesses were permitted to testify that *Graham* was a United States Supreme Court opinion, thereby arguably

¶33 Appellants also contend McDonald's expert's testimony about *Graham* violated Rules 702 to 704, Ariz. R. Evid. This argument has two interrelated aspects. First, appellants argue the testimony usurped the role of the trial court to instruct the jury on the law. Second, appellants maintain the expert's testimony invaded the province of the jury by applying a legal standard to the facts of this case.

¶34 The record does not support either theory. McDonald's expert did not attempt to persuade the jury that this was a § 1983 action masquerading as a negligence action, and thus the jury should return a verdict based on the *Graham* standard rather than the elements of negligence. Nor did he tell the jury how to decide the case. *Cf. Webb v. Omni Block, Inc.*, 216 Ariz. 349, ¶¶ 14, 19-20, 166 P.3d 140, 144-45, 146 (App. 2007) (expert opinion apportioning percentages of fault impermissible under Rule 704). Instead, McDonald's expert (like appellants' expert) offered *Graham* as one reference point the jury could choose to use in determining whether Klein breached his duty of care.[12] *See* Ariz. R. Evid. 702(a) (expert testimony admissible if, inter alia, helpful to jury to determine fact in issue); *see also Kopf v. Skyrm*, 993 F.2d 374, 375, 378-79 (4th Cir. 1993) (in § 1983 case, training

---

bolstering its importance or prestige in the jurors' minds. In this case, however, there were not multiple competing standards such that emphasizing the venerability of one standard over another might have prejudiced one party. Both sides' witnesses agreed that *Graham* provided the standard for reasonableness; they only disagreed about whether Klein's conduct met that standard. Thus, testimony that *Graham* was a United States Supreme Court case favored neither party under the facts of this case.

[12] We disagree with our dissenting colleague that expert testimony concerning *Graham* constituted "legal conclusions that . . . determine[d] the outcome of the case." Again, we emphasize *Graham* did not resolve the dispositive legal question. The dispositive legal question was whether the deputy had acted negligently under a standard both parties had apparently accepted. Indeed, both parties maintained that the standard set forth therein supported their position.

and use of K-9, a specialized law enforcement tool, proper subject for expert testimony because not within jury's common knowledge). Very similar testimony—lay and expert witnesses' personal assessments of the reasonableness of a defendant law enforcement officer's use of force—was not a basis for reversal in *United States v. Perkins*, 470 F.3d 150, 157-60 (4th Cir. 2006), a case we cited favorably in *Webb*, 216 Ariz. 349, ¶ 13, 166 P.3d at 144. And even if McDonald's expert's opinion embraced the ultimate issue of breach, it was not objectionable merely for that reason. Ariz. R. Evid. 704(a).

¶35 Appellants' reliance on *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042-46 (D. Ariz. 2005), is misplaced. There, the court precluded the plaintiffs' proffer of expert testimony by two law professors who had summarized relevant legal principles in reports that "read[] more like . . . legal brief[s] than . . . expert report[s]" and thus "invad[ed] the province of the trial court to determine the law." *Id.* at 1044-45. Yet the court permitted another law professor's expert opinion testimony on "relevant corporate norms and the relationship between [two defendants] in view of those corporate norms." *Id.* at 1046. McDonald's expert's testimony in this case is more similar to the latter admissible testimony in *Pinal Creek Group*, in that the expert discussed the national norms of police use of force, i.e., the *Graham* standard, and then offered an opinion as to whether Klein's conduct was in line with those norms.

¶36 *People v. Brown*, 199 Cal. Rptr. 3d 303 (Ct. App. 2016), another case on which appellants rely, is likewise unavailing. Brown maintained the officers had used unnecessary force, jumping on him and punching his head repeatedly after he was already face down on the ground. *Id.* at 310. At Brown's trial, the prosecutor called Sergeant Walle as an expert in police defensive tactics. *Id.* at 311. Walle testified in relevant part that *Graham* outlines the meaning of "reasonable force," but proceeded to mention only one of the three *Graham* factors. *Brown*, 199 Cal. Rptr. 3d at 311, 327. The court of appeal held the trial court had erred by denying Brown's motion in limine to exclude the testimony. *Id.* at 325.

¶37 *Brown* is readily distinguishable. First, it was a criminal case. As the *Brown* court was careful to note, "the scope of relevant subject matter implicating issues of excessive force tends to be

broader in civil cases than it is in criminal cases, and as a result, the probative value of testimony from an excessive force expert is typically stronger there." *Id.* at 329-30. This is so because "the Fourth Amendment focuses more narrowly on the moment force is used than state tort law does." *Id.* at 330. Second, Walle's explanation of *Graham* was "truncated" and "inaccurate," omitting two of the three factors in the *Graham* test, which were both potentially important in the case. *Brown*, 199 Cal. Rptr. 3d at 327-28. Here, McDonald's expert testified completely and accurately about the *Graham* reasonableness standard. Finally, in *Brown*, such expert testimony was not necessary because the officers there used only their bare hands, and, thus, the court emphasized it was "not a case in which the proper handling of some specialized law enforcement tool (e.g., a gun, *a dog*, a Taser[,] Mace, pepper spray) had to be explained" by expert testimony. *Id.* at 325-26 (emphasis added). Here, of course, the implement of force was a specialized law enforcement tool, a K-9. For each of these reasons, *Brown* is not instructive here. The trial court did not abuse its discretion in denying appellants' motion in limine.

Applicability of A.R.S. § 11-1025

¶38 Appellants argue the trial court erred in denying their motions for judgment as a matter of law under Rule 50(a) and (b), Ariz. R. Civ. P., because A.R.S. § 11-1025(B) prohibits bringing any action for damages for injuries caused by a K-9 under these circumstances. "Whether a trial court should have granted judgment as a matter of law presents a question of law, which we review de novo." *Stafford v. Burns*, 241 Ariz. 474, ¶ 35, 389 P.3d 76, 85 (App. 2017). We also review the interpretation of statutes de novo, *City of Phoenix v. Glenayre Elecs., Inc.*, 242 Ariz. 139, ¶ 9, 393 P.3d 919, 922 (2017), construing them as consistent with the common law if possible, *Jones v. Manhart*, 120 Ariz. 338, 340, 585 P.2d 1250, 1252 (App. 1978).

¶39 Pursuant to the common law, a plaintiff can recover for an injury by a dog if the owner "kn[ew] or ha[d] reason to know [the dog] has dangerous propensities abnormal to its class." *Id.*, *quoting* Restatement (Second) of Torts § 509 (1977); *see also Weekly*, 181 Ariz. at 163, 888 P.2d at 1350 (calling this theory "the 'one-free-bite' rule"). When the Arizona legislature enacted what is now § 11-1025(A), it

created a new cause of action that "expand[ed]" that common law liability, *Weekly*, 181 Ariz. at 163-64, 888 P.2d at 1350-51, imposing strict liability for dog bites "regardless of the former viciousness of the dog or the owner's knowledge of its viciousness," § 11-1025(A). *See also Murdock v. Balle*, 144 Ariz. 136, 138-39, 696 P.2d 230, 232-33 (App. 1985) (dog bite statute neither codified nor replaced common law liability, but created new cause of action; plaintiff may proceed simultaneously under statutory and common law theories). But the legislature included an important caveat in § 11-1025(B):

> Nothing in this section or in § 11-1020[13] shall permit the bringing of an action for damages against any governmental agency using a dog in . . . police work if the bite occurred while the dog was . . . assisting an employee of the agency in . . . the apprehension or holding of a suspect where the employee has a reasonable suspicion of the suspect's involvement in criminal activity.[14]

¶40 Section 11-1025(B) clarifies that neither § 11-1020 nor § 11-1025 provides a statutory cause of action for damages against a governmental agency for a K-9 bite upon reasonable suspicion of criminal activity. But McDonald did not attempt to bring a statutory strict liability action pursuant to §§ 11-1020 or 11-1025(A). Instead, he alleged common law negligence. Section 11-1025(B) is therefore inapposite.

---

[13]Section 11-1020, A.R.S., provides: "Injury to any person or damage to any property by a dog while at large shall be the full responsibility of the dog owner or person or persons responsible for the dog when such damages were inflicted."

[14] Section 11-1025(B) applies only where the agency has a "written policy on the necessary and appropriate use of [the] dog." § 11-1025(D). At all relevant times, the Pima County Sheriff's Department had such a policy.

¶41 "[T]he purpose of the dog-bite statutes was to expand the common law protection, not to diminish it." *Jones*, 120 Ariz. at 340, 585 P.2d at 1252. Nothing in § 11-1025 forecloses or abrogates a common law negligence action against law enforcement merely because the instrumentality of force used was a K-9. *See Qwest Corp. v. City of Chandler*, 222 Ariz. 474, ¶ 22, 217 P.3d 424, 431 (App. 2009) (court will not presume legislature has repudiated common law without clear manifestation of its intent to do so, either expressly or by necessary implication). As we have noted, in this context there is "no difference between a police officer directing a dog to attack a person and a police officer directing a blow at a person with a baton." *Weekly*, 181 Ariz. at 165, 888 P.2d at 1352; *cf. State v. Becerra*, 239 Ariz. 90, ¶ 13, 366 P.3d 567, 571 (App. 2016) (in search context, comparing officer's use of K-9 to officer's use of flashlight). Section 11-1025 does not preclude this action; thus, the trial court did not err in denying appellants' Rule 50 motions.

Disposition

¶42 We affirm. We also grant McDonald's request for costs upon compliance with Rule 21, Ariz. R. Civ. App. P., because he is the successful party in this civil action. A.R.S. § 12-341.

E S P I N O S A, Judge, dissenting:

¶43 Although I have doubts about my colleagues' legal conclusion that an intentional use of police force is subject to a negligence claim, primarily grounded on two decisions that do not address that issue, *Mulhern* and *Weekly*, I write separately because I believe several aspects of the trial procedure permitted by the trial court here unduly prejudiced Deputy Joseph Klein.[15] Because of the gravity of these errors, I respectfully dissent and would remand the case for a new trial.

[15] I refer only to Deputy Klein because the count alleging negligence by the Sheriff, formerly Clarence Dupnik, was dismissed and the Sheriff's only liability regarding the remaining count as found by the jury is presumably through respondeat superior.

Burden of Proof

¶44 At the outset, I agree with my colleagues' conclusion that requiring a defendant to prove justification does not make sense in a negligence case because, as Deputy Klein has noted, doing so results in "both parties effectively bearing the same burden of proof—reasonableness." Unlike the majority, however, I am not convinced "the error inured to [Klein's] benefit." Rather, I agree with the deputy's suggestion that "McDonald's burden was effectively lessened in precisely the type of situation where . . . it must be rigorously adhered to."

¶45 My concern regarding the burden of proof instructions in this case does not derive solely from the justification instruction given, but also from the manner in which the justification and negligence questions were presented to the jury. Although the preliminary jury instructions noted that McDonald had the burden of proving Deputy Klein's negligence, and Klein had the burden of proving his use of force was justified, in that order, the final jury instructions, given a week later, reversed the sequence and presented the burdens in a potentially verdict-altering way. *Cf. State v. Johnson*, 173 Ariz. 274, 276, 842 P.2d 1287, 1289 (1992) ("Instructions given just before the jury deliberates will likely make more of an impression than those given prior to the presentation of evidence.").

¶46 Deputy Klein's proposed final jury instructions included the following, based on A.R.S. § 13-409:

> In arresting or detaining a suspect or escapee, or in preventing escape after arrest or detention, a law enforcement officer is justified in using physical force if:
>
> 1. A reasonable law enforcement officer would believe that such force is immediately necessary to arrest or detain the suspect or escapee, or to prevent escape; and

2. The law enforcement officer makes known the purpose of the arrest or detention, if it is reasonable to do so; and

3. A reasonable law enforcement officer would believe the arrest or detention to be lawful.

The deputy also requested a jury instruction based on A.R.S. § 13-413: "No person in this state shall be subject to civil liability for engaging in conduct otherwise justified pursuant to the provisions of this chapter." Finally, he sought an instruction that McDonald had the burden to prove "Deputy Joseph Klein's use of the police canine was not justified." The trial court gave Klein's proposed § 13-409 instruction as requested, but modified the § 13-413 instruction to state, "In arresting or detaining a suspect or escapee, no law enforcement officer in this state shall be subject to civil liability for engaging in conduct otherwise justified," and, "Deputy Klein must prove that [his] use of force was justified."

¶47 Significantly, these instructions allocating the burden of proof to Deputy Klein were presented to the jury before any final instructions regarding McDonald's burden of proving the deputy's negligence. The only final jury instruction on McDonald's burden of proof was the general comparative fault instruction relating to all parties. In addition to the order of instructions itself, the jury was also directed to first determine whether Klein's use of force was justified and then, if it "f[ou]nd that Deputy Klein's use of force was not justified, [it would] determine whether the use of force was negligent."

¶48 "It is, of course, the universal rule that a plaintiff in a negligence suit must make out a prima facie case of actionable negligence by showing the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and injury proximately caused by such breach." *Berne v. Greyhound Parks of Ariz., Inc.*, 104 Ariz. 38, 39, 448 P.2d 388, 389 (1968). Moreover, "[t]he burden of proving

negligence rests upon the plaintiff, and it is not incumbent upon the defendant to prove an absence thereof." *Id.*

¶49 Although we generally presume juries follow the instructions they are given, *Golonka v. Gen. Motors Corp.*, 204 Ariz. 575, ¶ 21, 65 P.3d 956, 964 (App. 2003), and the jury here was instructed that McDonald was required to prove Deputy Klein's negligence, I question any jury's ability to first consider whether the deputy proved he acted reasonably and then consider whether McDonald proved he did not. If the jurors first found, in the order instructed, that Klein did not carry his burden of persuading them his decision was reasonable and thereby concluded his conduct was not justified, it followed that his conduct was unreasonable—the foundation of McDonald's entire case.

¶50 The problems inherent in the jury instructions as written and presented were further compounded by McDonald's rebuttal argument: "Th[e justification] statute says that the force must be immediately necessary. *Graham v Connor* says the threat must be imminent. The threat of the suspect must be immediate and imminent." In making this final exhortation to the jury, McDonald effectively combined the justification and negligence issues into a single, convenient but misleading, conflation of both tests. Simultaneously, McDonald eviscerated any distinction that may have existed between the justification question—Did the officer reasonably believe force was immediately necessary?—and the liability question—Was the decision to use force negligent?

¶51 It is well established in the criminal law arena that erroneously shifting the burden of proof to a defendant constitutes fundamental error and can occur through an implication arising from a jury instruction. *See Johnson*, 173 Ariz. at 276, 842 P.2d at 1289 ("The last burden of proof instruction the jurors heard told them, in part, 'your decision of guilty or not guilty must be based upon your conviction beyond a reasonable doubt.' That instruction improperly shifted the burden to the defendant to prove his innocence beyond a reasonable doubt."). Erroneously shifting the burden can also warrant reversal in civil cases. *See McDowell Mountain Ranch Cmty. Ass'n, Inc. v. Simons*, 216 Ariz. 266, ¶¶ 21-22, 165 P.3d 667, 672 (App. 2007) (reversing trial court's attorney fee award because court's

decision to award half of requested fees without argument suggested court incorrectly believed fee recipient had burden of proving reasonableness); *Feldman v. Lederle Labs.*, 625 A.2d 1066, 1072 (N.J. 1993) (finding jury instructions implicitly burdened defendant with proving reasonableness and were "capable of confusing, misleading, and otherwise prejudicing the jury," warranting new trial on tort claim).

¶52 The burden of proof is a foundational aspect of any case. Because the jury instructions and arguments here implicitly shifted the burden of proving reasonableness, a key component of McDonald's prima facie case, to Deputy Klein, a new trial is warranted.

Presumption of Reasonableness

¶53 The deputy's proposed jury instructions also included an instruction based on A.R.S. § 12-716. That statute provides that a police officer who uses force to "[e]ffect an arrest or prevent or assist in preventing a plaintiff's escape" will be "presumed to be acting reasonably" "[i]f the court finds by a preponderance of the evidence that a plaintiff is harmed while the plaintiff is attempting to commit, committing or fleeing after having committed or attempted to commit a felony criminal act." A.R.S. § 12-716(A)(1). McDonald objected to this instruction, and at the close of the evidence, the trial court sustained the objection on the basis that it was "unable to find by a preponderance of the evidence that [McDonald] attempted to commit, committed or fled after having committed or attempted to commit a felony criminal act."

¶54 Throughout the trial, however, there was ample evidence that McDonald's actions on the night at issue constituted felony flight from law enforcement. Section 28-622.01, A.R.S., provides, "A driver of a motor vehicle who willfully flees . . . a pursuing official law enforcement vehicle . . . is guilty of a class 5 felony." Unrefuted testimony clearly showed the vehicles pursuing McDonald were readily identifiable as marked law enforcement vehicles. Deputy Dixon testified he turned on his lights and sirens when he reversed directions to begin pursuing McDonald after McDonald had nearly collided with him. He also noted that all the

other deputies arriving at the scene were in marked police cars and had their lights and sirens on. Deputy Dixon further stated that, at the first stop, McDonald ignored the police lights and shouted commands, rolled up his window, and "sp[un] the tires" as he drove away.

¶55 The evidence showed that McDonald engaged the police in a "vehicle pursuit" for over two miles that included continued flight even after "going over the spikes," and Deputy Klein clarified from his police report that "the criminal charges at hand were A.R.S. 28-622[.]01, unlawful flight from law enforcement vehicle, a class five felony." Sergeant Hill likewise believed McDonald had committed "felony flight" by taking the deputies on a vehicle pursuit. And Lieutenant Stuckey testified McDonald committed unlawful flight "by running in his vehicle; that's a felony." Last but not least, the jury heard a portion of Klein's expert's report discussing § 28-622.01 specifically and noting that McDonald had intentionally fled from marked police cars pursuing him with lights and sirens activated.[16]

¶56 The facts leading up to the use of force were not in dispute and were more than sufficient to demonstrate by a preponderance of the evidence that McDonald was in the process of committing felony flight, or had just committed felony flight, when the canine was used to help ensure his arrest. That McDonald's expert witness testified, "Felony flight means the door flies open and that person bails out and takes off running" and therefore "[t]his wasn't felony flight" did not change what had already occurred, clearly demonstrating felony flight under § 28-622.01. *See State v. Martinez*,

---

[16] Although my colleagues have cited after-the-fact evidence that McDonald apparently suffered from a diabetic impairment that may have affected his judgment and intent, such evidence is irrelevant to what had already transpired at the time Deputy Klein utilized the police dog to subdue him. *See State v. Gendron*, 166 Ariz. 562, 564-65, 804 P.2d 95, 97-98 (App. 1990) (rejecting argument that § 28-622.01 requires proof of "willful state of mind" and instead reasoning that "wilfulness can be proven by evidence of intentional behavior"), *vacated in part on other grounds*, 168 Ariz. 153, 812 P.2d 626 (1991).

230 Ariz. 382, ¶ 8, 284 P.3d 893, 895 (App. 2012) ("[P]ursuant to A.R.S. § 28-622.01, the essential elements of the crime of unlawful flight are: (1) the defendant, who was driving a motor vehicle, wilfully fled or attempted to elude a pursuing official law enforcement vehicle, and (2) the law enforcement vehicle was appropriately marked showing it to be an official law enforcement vehicle."); *State v. Fogarty*, 178 Ariz. 170, 173, 871 P.2d 717, 720 (App. 1993) ("The defendant, in continuing to drive when a policeman in a police car ordered him to stop, engaged in behavior that had a greater potential for harm than would a mere refusal to stop for a policeman on foot.") (emphasis omitted); s*ee also State v. Hernandez*, 242 Ariz. 568, ¶ 16, 399 P.3d 115, 120 (App. 2017) (even low-speed chase is felony flight). And, the evidence established that, even after the vehicle pursuit came to an end, McDonald at no time demonstrated compliance with police directives or surrender in any way.

¶57 The trial court's failure to properly instruct the jury on the presumption of reasonableness under § 12-716 saddled Deputy Klein with yet another greater burden than he should have borne and reinforces my conclusion that this case merits a new trial.

Prejudicial Expert Testimony and Argument

¶58 Finally, the testimony and argument based on *Graham v. Connor*, 490 U.S. 386 (1989), went well beyond proper expert witness testimony addressing police use of force to instead instruct the jury on the wrong legal standard to be applied in the case. Because of the highly prejudicial nature of this improper testimony and argument, this too is reason to remand for a new trial.

¶59 The Arizona Rules of Evidence allow expert witness testimony if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Ariz. R. Evid. 702(a). My colleagues correctly note that what constitutes reasonable police use of force is an appropriate subject for expert testimony. This question is similar, though not identical, to the standard of care issue in professional malpractice and product liability cases, which often necessitate expert witness testimony to help jurors understand how to evaluate reasonableness in a specialized field. *See Preston v. Amadei*, 238 Ariz.

124, ¶ 10, 357 P.3d 159, 164 (App. 2015) (plaintiff in medical malpractice suit "must prove that the health care professional failed to comply with the applicable standard of care," which requires a "standard of care expert"); *Hohlenkamp v. Rheem Mfg. Co.*, 134 Ariz. 208, 213, 655 P.2d 32, 37 (App. 1982) (expert witness testimony on industry standards appropriate to show "whether the product was defective and unreasonably dangerous").

¶60 What my colleagues, as well as the trial court, have failed to recognize, however, is that testimony on a legal standard creates a unique problem that medical and industry standard testimony does not. The breach element of a negligence case asks the jury to answer two questions: What is the standard of care, and did the defendant meet it? *Cf. Johnson v. Pankratz*, 196 Ariz. 621, ¶ 18, 2 P.3d 1266, 1270 (App. 2000) (noting jury in ordinary negligence case can determine standard of care based on its own experience). Expert testimony on the standard of care provides the jury with helpful information for answering that first question. Expert testimony in the form of a legal standard, however, runs the risk of usurping both the jury's fact-finding role to determine the standard of care and the judge's role to determine the applicable law. *See Specht v. Jensen*, 853 F.2d 805, 807-08 (10th Cir. 1988) (expert must not "encroach[] upon the trial court's authority to instruct the jury on the applicable law" or "circumvent[] the jury's decision-making function by telling it how to decide the case"); *see also Furnstahl v. Barr*, 389 P.3d 635, ¶ 21 (Wash. Ct. App. 2016) ("[T]he province of the court—the trial judge—is to determine and decide questions of law presented at the trial and to state the law to the jury, while the province of the jury is to determine the facts of the case from the evidence adduced, in accordance with the instructions given by the court."), *quoting Hastings v. Dep't of Labor & Indus.*, 163 P.2d 142, 148 (Wash. 1945) (modification in *Furnstahl*).

¶61 This precise issue does not appear to have previously arisen in Arizona courts. There are, however, a number of federal court opinions addressing the issue under the Federal Rules of Evidence, which the Arizona rules mirror. *See* Ariz. R. Evid. 704 cmt. to 2012 amend. ("[T]he language of Rule 704 has been amended to conform to the federal restyling of the Evidence Rules."); *Preston*, 238 Ariz. 124, ¶ 34, 357 P.3d at 169 (appellate court "consider[s] federal

court decisions interpreting the federal [evidentiary] rule as persuasive authority for interpreting our state rule"). For instance, the Seventh Circuit has noted that "expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible." *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003). There, the court affirmed the district court's decision to exclude expert testimony "largely on purely legal matters and made up solely of legal conclusions, such as conclusions that the city's actions violated the [Fair Housing Amendments Act]." *Id.* Similarly, in *Snap-Drape, Inc. v. Commissioner of Internal Revenue*, the Fifth Circuit affirmed the district court's refusal to admit expert witness reports "contain[ing] analyses that lead to the conclusion that § 404(k) dividends are deductible" because those reports "improperly contain[ed] legal conclusions and statements of mere advocacy" not allowed under Rule 704, Fed. R. Evid. 98 F.3d 194, 197-98 (5th Cir. 1996).

¶62 The Second Circuit's opinion in *Hygh v. Jacobs*, 961 F.2d 359 (2d Cir. 1992), is particularly instructive. There, Hygh sued Officer Jacobs under 42 U.S.C. § 1983 for injuries Hygh sustained when the officer hit him, possibly with a flashlight, in the course of making an arrest. *Hygh*, 961 F.2d at 361. The Second Circuit noted it was "in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion," and further stated, "Even if a jury were not misled into adopting outright a legal conclusion proffered by an expert witness, the testimony would remain objectionable by communicating a legal standard—explicit or implicit—to the jury." *Id.* at 363-64. "Whereas an expert may be uniquely qualified by experience to assist the trier of fact, he is not qualified to compete with the judge in the function of instructing the jury." *Id.* at 364.

¶63 The Second Circuit recognized the danger in Hygh's expert providing a definition of deadly physical force that differed from the relevant state law definition, but found the error minimal because the difference was "not substantial" and "the [trial] court later charged the jury comprehensively regarding the standards by which Jacobs' use of force against Hygh was to be measured." *Id.* But the court found "[f]ar more troubling" the expert's testimony that

Officer Jacobs' actions were not "justified" or "warranted under the circumstances" and were "totally improper." *Id.* The court concluded the expert's "testimony regarding the ultimate legal conclusion entrusted to the jury crossed the line and should have been excluded." *Id.* Nevertheless, "[a]lthough the question [wa]s close," the court determined reversal was not required because the testimony was "within a larger body of otherwise unobjectionable testimony concerning police procedures" and "[t]he trial judge . . . instructed the jury extensively concerning Jacobs' use of force." *Id.* at 365.

¶64 Although McDonald's expert indicated he was not "[t]here to give any legal opinions," early on in his testimony he introduced *Graham v. Connor* to the jury as a three-factor test for when canine handlers can "justify using that amount of force." He then identified the three factors as "[t]he seriousness of the crime," "the threat that the suspect poses to the officer or the deputies," and "what resistance is [the suspect] producing to evade the deputies," all simultaneously being written on a display board by McDonald's attorney. The witness then applied those factors one at a time to Deputy Klein's release of the dog, concluding he "c[ould]n't see any reason to send a police dog as in this incident."

¶65 As noted in *Hygh*, 961 F.2d at 364, expert witness testimony "communicating a legal standard" is not appropriate under Rule 704, but that is precisely what McDonald's expert did in this case. And McDonald expressly reinforced *Graham v. Connor* as the applicable legal standard in closing arguments by stating the witness identified the *Graham* factors as "the three factors that we look at, the three-prong test that you have heard about again and again" and once more applying those factors to the case. Finally, in his rebuttal argument, McDonald made clear that *Graham v. Connor* provided the legal standard for the case: "*Graham v Connor* and the three-prong test, that's the standard. No one disputed that was the standard. No one said, I didn't review this under *Graham v Connor*, I didn't use a three-prong test. It was to the contrary, that is the standard of what was reasonable that night."

¶66 The trial court having denied Deputy Klein's motion in limine to preclude testimony on *Graham v. Connor* and other Fourth Amendment case law, and McDonald having introduced *Graham v.*

Connor as the relevant legal test, the deputy was forced to attempt to mitigate the damage by asking his witnesses about *Graham*'s application to the case at hand. Additionally, during closing argument, Klein's counsel stated, "[Y]ou've heard a lot about *Graham v Connor* and the three factor test, but you don't have a jury instruction on that. You have a jury instruction that says was the conduct reasonable for a reasonable law enforcement officer."

¶67 But Deputy Klein never should have had to contend with the unfair prejudice caused by McDonald introducing a Fourth Amendment legal standard in his negligence case. Although McDonald was entitled to introduce expert witness testimony on when police use of force is reasonable and factors police consider when deciding whether a dog is an appropriate tool, to go beyond discussing such factors generally and inform the jury a United States Supreme Court case provided the legal standard to be applied, strayed far into the territory of impermissible testimony under Rule 704. *See Specht*, 853 F.2d at 810 (remanding because of improper expert witness testimony "direct[ing] the jury's understanding of the legal standards upon which their verdict must be based").

¶68 Moreover, unlike in *Hygh*, 961 F.2d at 364-65, and compounding the prejudice to Deputy Klein, the jury here was not given comprehensive instructions on the proper legal standard, which might have mitigated the damage caused by the improper expert testimony and argument. To the contrary, the jury was simply instructed that "reasonable care" was the standard and, as McDonald argued in rebuttal, *Graham v. Connor* constituted "the standard of what was reasonable." Also unlike in *Hygh*, 961 F.2d at 364, the difference between McDonald's negligence standard and Arizona's was substantial: an expert-furnished three-prong test is worlds away from a jury-driven reasonableness inquiry. The expert witness's introduction of *Graham v. Connor* and its repeated emphasis constituted improper expert testimony on a legal standard, an error exacerbated by McDonald's arguments to the jury and the trial court's failure to provide any instruction sufficient to override the error.

¶69 In sum, given the multiple errors in the trial procedures permitted by the trial court, Deputy Klein did not receive a fair trial.

Accordingly, I dissent from my colleagues' analyses and conclusions, and would remand the case for a new trial free of prejudicial errors.